

(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **DEC 05 2013**

OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software business. It seeks to permanently employ the beneficiary in the United States as a Senior Software Development Engineer – WPS Dev or Other. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree and does not support the visa classification selected on the Immigrant Petition for Alien Worker. (Form I-140). On appeal, the petitioner submits additional evidence and asserts that the petition merits approval.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.<sup>1</sup> The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

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<sup>1</sup> *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

The regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

The director's decision determined that the job offer described in the labor certification does not support the visa designation on the Form I-140 as an advanced degree professional. This is a separate question from whether the beneficiary possesses an advanced degree.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Master's.
- H.4-B. Field of Study: Comp. Sci., Engineering, Math., Info. Sys., Physics, or a related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 (months).
- H.7. Is there an alternate field of study acceptable? Yes.
- H.7-A If Yes, specify the major field of study: Comp. Sci., Engineering, Math., Info.Sys. Physics, or a related field.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Is Experience in an alternate occupation: Yes.
- H.10-A If Yes, number of months experience in alternate occupation required: 24.
- H.10-B Any computer related occupation.

As stated above, the labor certification's minimum requirements for the job is a Master's degree in Computer Science, Engineering, Math, Information Systems, or a related field and two years of



experience in the job offered or two years of experience in any computer related occupation. No alternate combination of education and experience is accepted.

However, in H.14 of the ETA Form 9089, which requests specific skills or other requirements, the petitioner states:

Requires Master's degree *or equivalent* (including foreign equivalent degree) in Computer Science, Engineering, Mathematics, Information Systems, Physics or a related field and 2 years of experience in the job offered or any computer related occupation.

Also requires education or experience in: Web Services, Multi-threaded programming, .NET Framework, IIS, and NET/Windows.

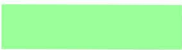
Any suitable combination of education, training or experience is acceptable.

The code listed in F.2, 15-1031.00, relates to the O\*NET code and the SOC 2000 code. The SOC 2010 code provided on the ETA 9141 is 15-1132.

Emphasis added.

On appeal, the petitioner, through counsel submits a declaration, dated February 15, 2013, signed by the petitioner's senior attorney and immigration compliance manager, [REDACTED] Mr. [REDACTED] asserts that the petitioner intended the actual minimum requirements to be only a "Master's degree in an acceptable field of study awarded by an accredited U.S. university or a foreign equivalent degree awarded by a university." This raises the question why the phrase "*or equivalent*" was added after stating the requirement of a Master's degree and the inclusion of consideration of a foreign equivalent degree.

The petitioner also provided copies of job postings [petitioner's exhibit(s) 2, 7, and 8 submitted in response to director's December 19, 2012, Request for Evidence (RFE)] that reflected the same educational requirements as stated above. The state job order, notice of posting, and the petitioner's website posting all stated, "Master's degree or equivalent (including foreign equivalent)" and the fields of study listed above. Other copies of job advertisements (petitioner's exhibits 3, 4, 5, and 6 submitted in response to the director's RFE) contained only referrals to websites. Those ads were for multiple positions and job titles. None of the advertisements contained specific educational or experience requirements. USCIS is required to examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale & Linden Park Co. v. Smith*, 595 F.Supp. 829, 833 (D.C.D.C. 1984). In this case, the AAO concurs with the director's decision. The petitioner's language in H.14 implies that additional unspecified alternate equivalencies other than a foreign equivalent degree to a U.S. master's would be considered. Therefore, it must be concluded that the terms of the labor certification failed to comply with 8 C.F.R. § 204.5(k)(4)(i) and do not clearly support the visa designation of an advanced degree professional on the Form I-140, Immigrant Petition for Alien Worker.



The offered position's requirements set forth on the ETA Form 9089 fails to comply with 8 C.F.R. § 204.5(k)(4)(i). The director's decision is affirmed.

**ORDER:** The appeal is dismissed.